In the

Supreme Court

of the

United States

OCTOBER TERM, 1971

MOTION FILED
OCT 7 1972
Denied 10-16

NO. 71-1315

HOWARD ALEXANDER, et al.,
Petitioners,

vs.

COMMONWEALTH OF VIRGINIA,
Respondent.

**On Writ of Certiorari to
The Supreme Court of Virginia**

Motion for Leave to File Untimely Amicus Curiae Brief and to Participate in the Oral Argument by Joel Hirschhorn, Esq., as Amicus Curiae in Support of Petitioners.

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Joel Hirschhorn, Ralph J. Schwarz, Jr., and Mel S. Friedman, Esqs., amicis Curiae on behalf of Petitioners respectfully moves that leave be granted to Joel Hirsch-

horn to participate in the oral argument as amicus curiae in support of Petitioners. A brief amici curiae by the said Joel Hirschhorn, Ralph J. Schwarz, Jr., and Mel S. Friedman, Esq., on behalf of Petitioners, has heretofore been filed with the court with the consent of all the parties to the cause.

1. The interest of amici in this case arises from the fact that they are counsel in a profusion of cases, in Federal and State courts throughout the United States involving the same constitutional issue before the court in this case, namely, whether it is constitutionally permissible for a State to punish the dissemination of allegedly obscene material to adults, in the light of the free speech and press, due process and equal protection provisions of the First, Fifth, Ninth and Fourteenth Amendments to the United States Constitution.

2. The First Amendment Lawyers' Association is an informal organization comprised of approximately seventy-five attorneys who participate extensively in First Amendment litigation involving literally thousands of cases throughout the United States in both State and Federal courts.

3. Amici believe that oral argument will provide assistance to the court, not otherwise available. The formulation of standards and criteria, relative to the dissemination of material dealing with sex and nudity to adults, by the court, involves considerations reaching beyond the particular concrete situation presented in the case herein. There is need for the court to know, it is submitted, the operation and effect of obscenity statutes

and their impact upon the exercise of freedoms of speech and press by the adult community throughout the United States. Oral argument would offer the opportunity to present to the court essential facts, important data, and empirical evidence, as well as a summary of diversified experiences which bear importantly upon the substantial constitutional question presented to the court. The argument would inform the court with respect to the chilling effect of obscenity statutes upon the circulation of constitutionally protected material to adults. There is also probative data available that obscenity statutes for adults necessarily lend themselves to arbitrary, discriminatory and selective enforcement. The information and evidence which amicus is prepared to furnish the court on oral argument will, it is submitted, be fruitful, illuminating and helpful to the court in determining the substantial constitutional issue presented in the case.

4. The instant brief of amici curiae is not timely due to the following facts:

a. The decision to write a brief as amici curiae was made after the respective due date of counsel of records' brief;

b. Due to the press of numerous other trial and appellate matters the undersigned amici were unable to complete this brief timely;

c. This brief and motion is filed in good faith and with the intention of aiding this court in resolving the urgent and vital issues presented to the court.

WHEREFORE, amici respectfully pray that the Motion for Leave to File Untimely Brief as amicus curiae be granted, and the Motion for Leave to Participate in the Oral Argument by Joel Hirschhorn, as amicus curiae, likewise be granted, and that the court allot such time for oral argument as may seem proper.

DATED: October 2, 1972.

Respectfully submitted,

Joel Hirschhorn, Amicus Cruiae
Ralph J. Schwarz, Jr., Amicus Curiae
Mel S. Friedman, Amicus Curiae

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of October, 1972, copies of the above and foregoing were mailed, postage prepaid, to all attorneys of record; I FURTHER CERTIFY that all copies required to be served herein have been served.

JOEL HIRSCHHORN, Amicus Curiae

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NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 71-1315

Howard Alexander et al., Petitioners, v. Commonwealth of Virginia. } On Writ of Certiorari to the Supreme Court of Virginia.

[June 25, 1973]

PER CURIAM.

The judgment of the Supreme Court of Virginia is vacated and the case is remanded for further proceedings consistent with *Miller* v. *California*, — U. S. — (pp. 9–11) (1973), *Paris Adult Theatre I* v. *Slaton*, — U. S. — (pp. 8–9, n. 7) (1973), and *Heller* v. *New York*, — U. S. — (1973). See *United States* v. *12 200-Ft. Reels*, — U. S. — (p. 7, n. 7) (1973). A trial by jury is not constitutionally required in this state civil proceeding pursuant to § 18.1–236.3 of the Code of Virginia, 1950, as amended. See *Melancon* v. *McKeithen*, 345 F. Supp. 1025, 1027, 1035–1045, 1048 (ED La. 1972), aff'd *sub nom. Mayes* v. *Ellis*, 409 U. S. 943 (1972), and *Hill* v. *McKeithen*, 409 U. S. 943 (1972). Cf. *Kingsley Books, Inc.* v. *Brown*, 354 U. S. 436, 443–444 (1957).

Vacated and remanded for further proceedings.

MR. JUSTICE DOUGLAS would reverse the judgment of the Supreme Court of Virginia. See *Miller* v. *California*, — U. S. —, — (DOUGLAS, J., dissenting).

SUPREME COURT OF THE UNITED STATES

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[June 25, 1973]

MR. JUSTICE BRENNAN, with whom MR. JUSTICE STEWART and MR. JUSTICE MARSHALL join, dissenting.

I would reverse the judgment of the Supreme Court of Virginia and remand the case for further proceedings not inconsistent with my dissenting opinion in *Paris Adult Theatre* v. *Slaton* — U. S. — (1973). See my dissent in *Miller* v. *California*, — U. S. — (1973).